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Tracing the positive obligations of criminal law from the jurisprudence of the European Court of Human Rights and the International Criminal Court. Possible tests of a not yet definitive model for an evolving interpretative reconstruction

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Abstract: The present work aims to investigate in a comparative manner through the jurisprudence of the European Court of Human Rights and the statutes of the international criminal courts the criminal sector, as traces of the general part of criminal law. It is a criminal law of reconstructive theoretical model with evolving interpretative perspectives especially of the jurisprudence of the international criminal tribunals which aims to build positive models for criminal protection. It carries out through the relative jurisprudence steps forward by building a maturity in the general part of criminal law. Because of all this, crimes against humanity finally follow a punishable path, outside of political contexts of the past and put domestic law, as

we see in the case of Germany, in a position of reflection regarding international crimes but also of harmonization, integration with international law leaving questions such as that of superior responsibility, etc. open, i.e. constantly evolving and reflecting.

Keywords: ICC; ad hoc criminal tribunals; ECHR; ECtHR; art. 83 TFEU; general criminal law; negligence; recklessness; international case law; international criminal justice; reason to know; command responsibility; prevent or punish; responsibility to protect; offensiveness; gross negligence; Joint Criminal Enterprise; mens rea; advertent reckelssness; intent and knowledge; core crimes; corporate due diligence.

Introduction

Nowadays the jurisprudence of the European Court of Human Rights (ECtHR) is an important reality for all branches of law as well as for the evolution of criminal law. The positive obligations that have arisen from the related cases create food for thought that follow a concrete perspective for the categories of positive obligations, defined as the core rights but also balanced rights outlined in the general part of criminal law that characterizes some complex points of them (Rogers, 2003; Klatt, 2011; Lazarus, 2012; Xenos, 2012; Maugeri, 2013;

Stoyanova, 2018).

The time is ripe for building the traces of theoretical models coming from jurisprudence. That is, a necessary caveat where the readings of international jurisdiction with a rich and articulated way follow and try to draw general conclusions.

In the same way, the conventional cross-fertilization law coming from the European Union forms an interpretation that respects the elements of the general part of criminal law. That is, subjective elements with causal links, etc. that form the basis of the directives that seek to harmonize, integrate the EU within the criminal jurisdiction attributing according to art. 83 TFEU (Blanke, Mangiamelli, 2021)[1] an operation that is part of the European Public Prosecutor's Office.

It includes the areas of expertise where they progressively reaffirm a hybridization of dogmatic categories of European criminal law that considers the legal traditions of various European contexts and not simply the progressive spatialization of many rulings from the ECtHR that demonstrate issues that are problematic and have to do with the existence of individual

1See in particular: Art. 9, lett. F Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335, 17.12.2011, p. 1–14. in article 3, par. 1 is affirmed that: "(…) suspected or ought to have known that the property was derived from criminal activity (der Täter den Verdacht hatte oder ihm bekannt hätte sein müssen (in german language); el autor sospechara o debiera haber sabido (in spanish language); l'auteur de l'infraction soupçonnait ou aurait dû savoir (in french language); o autor da infração suspeitasse ou devesse ter sabido (in portugal. language).

states and Member States of the EU forming a jurisdiction of a supranational nature.

Are there any traces of general criminal protection from the ECtHR?

Positive obligations of transnational criminal protection are the common denominator of obligations that are based on art. 8 of the European Convention of Human Rights (ECHR) (Villiger, 2023). That is, a common factor that evaluates risk management. To do so, state authorities allow measures that are suitable to protect rights that are involved in the risk authorities, where the rights are exposed and require measures of diligence and good faith.

The first guidelines emerge from the violation of art. 2 ECHR (Villiger, 2023), where they concern positive obligations together with art. 8 ECHR (Villiger, 2023), which directly identify in the matter of negligent liability (Liakopoulos, 2018; De Vries, 2023), a crisis of categories. The blame falls on the applicability of the precautionary principle. The difficulties of application fall on some categories of criminal law (Ashworth, Zedner, 2014), which determine the precautionary guidelines of the protection obligations, that are based on a critical, dialectical reconstruction that respects the punitive intervention of a super prevention.

Considerations that play a different role to the state that takes a position regarding actual, potential violations of rights to the people who are involved, according to the ECtHR, positively oblige the violations that they perpetrate to state agents. Private individuals bear obligations where they need an ascertainment of the causal link and the violation of the right that is protected by the ECHR, i.e. directs the omission conduct of the state that is in default to protect the positive obligation of the criteria that ascertain the reconstruction of paradigms applicable from concrete cases. The responsibility from command operates and distinguishes with subjective, objective way positive obligations of a criminal protection that emanates from the jurisprudence of the ECtHR where the violations exist to a state not individual responsibility.

Such responsibility from command limits the international crimes provided form the statute of the International Criminal Court to a necessity that exists to contextual elements that are variable to the cases considered. Limited crimes such as crimes against humanity, war crimes, and crimes of aggression, where they typify contextual elements of a long normative and jurisprudential evolution are not able to resolve doubts of a dogmatic nature of certain applicability (Triffterer, Ambos, 2016; Liakopoulos, 2018; Ambos, 2022)[2].

2See Art. 28 Statute of the ICC-Responsibility of commanders and other superiors. In addition to other grounds of criminal responsibility under this statute for

It takes into account the differentiated collaboration of an ordinary discipline that is provided by the same statute of the ICC in the matter of complicity of persons in crime and according to art. 25, par. 3 where the forms of authorship (Liakopoulos, 2018a), co-authorship, instigation, complicity that contribute to the realization of a joint criminal enterprise (Liakopoulos, 2019a)[34] of autonomous responsibility are formed

crimes within the jurisdiction of the Court: (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command or control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, but known that the forces were committing or about to commit such crimes; and (ii) That military commander or person failed to take the necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (i) The superior either knew, or consciously disregarded information which clearly indicated, that subordinates were committing or about to commit such crimes; (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation or prosecution (…)".

3The JCE-doctrine has been introduced by the Appeals Chamber of the ICTY in Prosecutor v. Tadić, Judgment, Case No. ICTY-94-1-A, 15 July 1999, parr. 185-229 as customary international law and has subsequently been applied in numerous cases, including ICTY, Prosecutor v. Krajišnik, Judgment, Case No. ICTY-00-39/40, 27 September 2006; Id, Prosecutor v. Brđanin, Judgment, Case No. ICTY- 99-36-A, 3 April 2007 and Id, Prosecutor v. Popović et al., Judgment, Case No. ICTY-05-88-T, 10 June 2010. Prosecutor v. Krnojelac, Judgment, Case No. IT-97-25-A, A. Ch., 17 September 2003, paras. 30, 73; Prosecutor v. Krstić, Judgment, Case No. IT-98-33-A, A. Ch., 19 April 2004, parr. 266-269; Prosecutor v. Kvoćka et al., Judgment, Case No. IT-98-30/1-A, A. Ch., 28 February 2005, parr. 79-91. Prosecutor v. Radoslav Brđanin, Decision on Interlocutory Appeal, IT-99-36-A, Appeals Chamber, 19 March 2007, par. 6.

4See Art. 25, par. 3 of the statute of the ICC-Individual criminal responsibility. In accordance with this Statute, a person shall be criminally responsible and liable for

and the author presupposes a subordinate-superior relationship. The superior based on concrete circumstances knows that the act in execution that he commits with the superior civilians ignores the information to adopt necessary, reasonable measures to prevent a criminal act that punishes the responsible. This is an orientation where criminal liability for non-preventative acts are verifiable and concerns the cases of interpretations that lead to the special complicity of persons in the crime.

The hermeneutic settings of autonomous reconstruction fall into a dogmatic nature that attributes to the crimes that are committed by subordinates the relative terms of an event, as well as the objective condition of punishability as a necessity that ascertains the causal link of any profiles of a subjective nature.

The interpretation of the word that provides useful elements by the jurisprudence of the ECtHR is linked with expressions such as gender knew or should have known but also with necessary

punishment for a crime within the jurisdiction of the Court if that person: a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; b)orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: i) be made with the aim of furthering the criminal activity or criminal purpose of the group involves the commission of a crime within the jurisdiction of the Court; or ii) be made in the knowledge of the intention of the group to commit the crime; e) in respect of the crime of genocide, directly and publicly incites others to commit genocide (…)".

measures where the authorities adopt to prevent the related violations that are verified to carry out a causal link assessment that prevents state authorities from producing other types of violation. Thus a general need arises that outlines a criminal path that is inspired by the ECtHR as a coherent logic, linked with a specific dogmatic where the cornerstones are individual responsibility and with profiles that have to do with the responsibility of entities (Liakopoulos, 2019c)[5].

5See first of all the UN Guiding Principles on Business and Human Rights, which has inspired also the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, PE/78/2019/REV/1, OJ L 305, 26/11/2019, p. 17–5. See also the agenda of UN of 2030: https://sdgs.un.org/2030agenda where they have identified the objectives of sustainable development and, the OECD guidelines on corporate governance in relation to state priority enterprises. The related principles of corporate governance are developed according to the ideas of the G20 to facilitate institutional measures of a legislative, programmatic nature in favour of enterprises for medium and long-term investments where they guarantee in a concrete and effective way the promotion, protection of human rights and effective implementation of due diligence by enterprises where the priorities are: "(...) 1. Strengthening the process of configuring a regulatory framework for Human Rights Due Diligence, in compliance with international standards and developments at EU level, in order to identify, prevent and mitigate risks and manage the possibility of violations of human rights by the enterprise; 2. The promotion of fundamental rights in the conduct of business activities both offline and online along the entire production chain, at local, national, regional and global level; 3. The fight against all forms of discrimination in the definition of the company's strategic priorities to ensure a performance that respects diversity, with particular reference to automated information management mechanisms and digital systems; 4. A collective awareness of the impact that new technologies, and in particular artificial intelligence, could have on the enjoyment of human rights, while at the same time paying attention to the promotion of corporate due diligence processes on human rights in the activities of those companies that deal with the research and development of new technologies; 5. The strengthening of measures to prevent and combat all forms of exploitation in the work sector, both public and private, which see vulnerable categories as victims, with particular reference to women, minors, people with disabilities, LGBTIQ+; 6. The strengthening of legislative and programmatic measures relating to the prevention and fight against the phenomenon of gangmastering (especially in the agricultural and construction sectors); 7. The continuation of the planning and implementation of surveillance actions and information initiatives for the prevention of illicit activities and the

Reconstruction of general institutes of criminal law

Studying carefully the jurisprudence of the ECtHR we see that there are no sentences to ascertain the subjective connection of the omission of a conduct of a dutiful type for the state and the production of damage, danger of goods, of the subjects who are recurrent from the same ECtHR. Thus, it is useful to trace the relative coordinates to form the interpretation connected with the responsibility from command.

Further work is required to identify the independent elements of the causal link as well as the subjective elements that in a variable way define the general formulas where in an arbitrary way and through the analysis of a complex system of the same jurisprudence they highlight the relative variables to be investigated.

The independent variables identify a malicious, negligent character of a conduct that is harmful to the right suitable to influence the scope of a positive obligation of protection. Thus, the state and non-individual character of a responsibility that arises from the schemes of a different reasoning coming from an

promotion of legality in the field of outsourcing of business activities and subcontracting chains, aimed at ensuring adequate protection for the workers concerned and effective awareness of their rights; 8. The consolidation of the role of each country in the context of the processes of international cooperation for development based on human rights, in order to achieve the sustainable development objectives established in the framework of the 2030 agenda; 9. The promotion of ecosystem protection and the conduct of environmental sustainability processes, taking into account the impact of the company's interventions on people and communities in the medium and long term".

application that is consistent with the positive obligations, specific to concrete cases and according to the modalities that ascertain the causal link, as a subjective link between the dutiful state and subjective conduct, as the production of an event of damage and danger. In an indirect way, the state is connected to a conduct where it immediately violates the rights that are established by the ECHR itself. As an example, state agents of subjects perform activities within contexts that refer indirectly to the state[6].

6See the section 6(3) dello Human Rights Act: "In this section "public authority" includes: a court or tribunal, and any person certain of whose functions are functions of public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings (…)". The Human Rights Act Reform: A Modern Bill of Rights of December 2021 took into account the amendments that better defined the scope of application. An intervention that also concerned the consultation paper where it brought the positive obligations of protection that represent a violation of the principle of legality where it separates the powers and which defines the law of the parliament. This is a consultative document that starts from a shared position where the United Kingdom has continued to respect the rights that are provided by the ECHR that has operated to a reduction that binds the pronouncements of the ECHR by putting the limits at the forefront as filters of prediction, as remedies also of an internal nature for violations of fundamental rights where the efficient needs of a judicial system that guarantees domestic security concerns appeals where the expulsion orders are based on the need that respects private and family life as subjects who have affective relationships that are stable within the United Kingdom and that consider the respect of the reasons of national security, the dangerousness of subjects who are suspected, those convicted for crimes of social alarm especially in the sector of terrorism. The Human Rights Act Reform: A Modern Bill of Rights – Consultation response of June 2022 in a way we can say negatively has highlighted the risks for the protection of fundamental rights, the access to remedies that apply to the categories of vulnerable subjects and who are deprived of means that positively bring to the jurisprudence of the ECtHR as positive obligations that clearly protect human rights, the attitude of self-restraint that identify and describe the positive obligations on the part of the ECtHR and on the part of the domestic courts when the reception by the part of the national legal system comes into conflict with the expansion of obligations of the government authorities of documents that offer consultations. In particular, section 6 (3) of the Human Rights Act in relation to the notion of public authority and the lack of need for reform given the fluidity of the notion in the way we live and above all the precise boundaries for the

A complex construction is noted that deals with the cause of interaction between independent variables that are connected differently in a way to influence the outcome of the proposed model. The general formula, as a theoretical paradigm, develops the processes between the identified variables subjected to verification.

The application of such processes, through the jurisprudence of the ECtHR, are evident in characterizing the deductive-prospective method that outlines various theoretical models applicable to specific cases where they are outside of a guideline that is approached in a coherent way to an elaboration of a general formula that takes into consideration the conducts of violation of fundamental rights, as basic facts where the positive obligations of protection explain malicious behaviors as an event that refers to individual responsibility, where the disvalue of the conduct is qualified in the present coefficient of what is truly malicious conduct and/or danger.

provision of positive obligations to state authorities and conduct which has infringed fundamental rights which take into account private individuals in British case law have to do with positive obligations of the ECHR in cases of conduct which is directed at the state and conduct by private individuals. See also the Commissioner of Police of the Metropolis v DSD and another, 21 February 2018, [2018 UKSC 11]): https://www.supremecourt.uk/cases/uksc-2015-0166.html

Some hypothetical forms that confirm the deductive-prospective approaches

Trying to outline the hypothetical theoretical models, within the jurisprudence of the ECtHR, means checking, verifying the interpretative use that identifies various scenarios of variable scope that operates independently. Thus we note the malicious behaviors of an event, damage of state responsibility, where the paradigm of improper omission declines in cases where the responsibility comes from the existence of a position, that protects the control of the state and in the hypotheses where it prevents the illicit conduct of others (Villiger, 2023)[7]. That is to say in cases of conduct that comes from private individuals.

In such a case, knowledge and intent are the probable consequences of a conduct where the events exist in the causal link between event and omission. Moreover, the conduct of state agents is differentiated from the behavior of private individuals with regard to the evaluation that takes into account the demarcation line of private and public sphere.

The analysis of the subjects' behaviors are evaluated by various

7ECtHR, C.A.S. and C.S. v. Romania of 20 March 2012, par. 70, which is affirmed that: "(…) the scope of the state's positive obligations might differ between cases where treatment contrary to Article 3 has been inflicted through the involvement of state agents and cases where violence is inflicted by private individuals, the requirements as to an official investigation are similar (...) it can therefore be deduced as an argumentum a contrario, that on the level of substantive obligations there can be a more significant differentiation with respect to that which concerns procedural obligations, depending on whether the behaviour is carried out by state agents or by private individuals, without, in our opinion, weakening the scope of the obligations arising from violations perpetrated by private individuals (…)".

forms of hybrid coefficients where dolus eventualis and conscious guilt are part of the common law matrix, that is, of recklessness that affects a quantitative level that includes the psychological parameter and the degree of guilt but also a qualitative one that builds the criminal type that refers to the intent, blow, i.e., the consequences that are placed in the dogmatics of the individual elements that ascertains the state that has omitted the preventive measures that are chosen as adequate.

The behaviors of a positive conduct pass over the awareness of limits, security measures to verify the harmful result, the systems, that avoid taking the agent to pursue, evaluate the configurability of a state responsibility, as a paradigm of improper omission responsibility that exists as a valid reason and adopts a theoretical model.

The distinction between active and omission conduct has as its objective the differentiation of use of the concepts of eventual intent and negligence. In practice, the ECtHR formulates these rules from the statute of the ICC.

As regards the subjective element, the jurisprudence of ad hoc courts has confirmed at international level the separation of guarantee obligations from the obligations of diligence that contribute to and found the relative omission, thus building the result of avoiding and contributing to the identification of a

criminal conduct that functionally determines but also addresses and prevents an event. The objective negligent conduct requires the guarantor to specify the precautionary rules.

Such conduct enhances the circumstances of a specific case where the modalities complete the model of a dutiful behavior that distinguishes the causality of the omission from the causality of the negligence.

The need to provide a distinction, even of a partial type, occurs in the case where the obligation of guarantee and of diligence is a precise coincidence between the same. Thus, it is not the requirements that are distinguished on two levels, but the practice of the dutiful conduct that follows the relative attribution of a function that chooses the position of the guarantee according to the existence of the legal powers that are impeding.

The model that constructs an improper omission liability for domestic conduct is present in cases of malicious basis. In this case the model to follow is that of negligence as a construction that is inspired by the foreseen hypothesis of an omitted attitude that prevents the commission of crimes.

On an objective level, the causal link and the omitted impediment and the commission of crimes by state agents and private third parties are ascertained.

From a subjective point of view, the demonstration of a

negligent title for state authorities is the consequence of a violation of control obligations where supervision characterizes the degree of definition.

Negligent behaviors as a form of negligent cooperation (Liakopoulos, 2019d) have a theoretical-dogmatic character that concerns the interpretation of an institution of valorization in the application stage where the results are convincing with regard to cooperative situations involving organizations that assist figures of levels of responsibility, such as diversified roles and a distinction of competences where the attributions of powers to their function are traced.

The controversial interpretation concerns the function of elements necessary for the configurability of the psychological link of conducts, where the existence of a violation of a precautionary rule ascertains the causal link of a single title of subjective imputation.

Thus the theoretical model considers as applicable the limits where they eventually find application to the reconstruction of a nexus of risks, where the omitted impediments that verify the illicit activities are typically connected with the risk that provides for the omitted precautionary measures that tend to prevent the verification that distinguishes the hypotheses of a specific negligent person from independent negligent causes and the conducts that are negligent and have created a different

connection that risks the collective harmful event.

In other words, itt is necessary to put the verification of an involvement that manages the risk that contributes the connection between the conducts that operate on the action plan and the regime of caution that asks each subject to create relationships with the conduct of other subjects that involve the management of the relative risk.

Reconstructing in a complex way the extension of guarantees and in the absence of specific obligations that dynamically prevent the precautionary rules is a plot that cooperates with the actual reality of the behaviors that are controlled. Thus the relational reconstruction of the fault enhances the role of phenomena that take into account the management of risks of other subjects who are already in charge.

It is a scheme that asks in an individualized way and on an objective level a position that guarantees and attributes impeding powers.

The precautionary duty of the competence of the management risks from the violation of precautionary rules is a position where the fault is ascertained on a subjective level.

We can refer to and take as an example an accident at sea where the responsibility for the crime of negligent shipwreck comes through the omission that consists in the implementation of ad hoc precautions, where the change of course, the use of radar,

the adoption of signals that warn in a generic way, the predisposition that realizes the visual and auditory service goes back under the responsibility of the helmsman. He must take position to avoid the risk of collision adding the commander who has the experience and possession of relative requirements for this position.

In this case the guarantee does not have to do with the event or the negligent responsibility of the guarantor. And this is because the principle of guilt is a precautionary rule both specific and generic that comes into conflict with whoever tries to prevent.

The psychological element is unilaterally intertwined with the awareness of the material fact regardless of the knowledge, where the culpable nature of the conduct establishes the material awareness of the imprudent, inexperienced, negligent conduct.

And from the subjective point of view the conducts exist to the subjects that involve the circumstances that allow the relative qualification of the fault to a behavior of the competitor where it requires the awareness of a qualification as a precautionary instance that emerges from a combination of feasible conducts.

Difficulties are noted in reconstructing a conceptual scheme where the hypotheses are linked to the necessary measures that the state itself knows and the other subjects respect, i.e. the existing activation duties, suitable for configuring autonomous omission crimes. Thus, the identification of obligations of

guarantee, diligence and risk connection of a psychological link between the conducts reconstructs the existence of subjective aspects that do not focus on the predictability of the competitor's conduct (Liakopoulos, 2020a).

This is a model of theoretical conception where the state is called to give answers to the omissions and measures that are necessary to know. In this way, the subject also assumes a position that guarantees with fulfilled manner the legal obligation that prevents the event, i.e. an improper crime of omission that does not depend on the existence of a guarantor position and a necessity that includes the risk of a psychological bond between subjects.

The difficulties in these sectors, especially technological, productive, involve an identification that can be relied on parameters that have a nomological nature and that evaluate the existence of a risk connection, of rules of an experience, where the high level of reliability repeats to a general logical foundation a judgment of avoidability and predictability.

The reference to the precautionary principle is based on an application that is based on the jurisprudence of the ECtHR. Thus, we think of a complete model of autonomous responsibility that omits the culpable impediment of the harmful, dangerous consequences that build the terms of a culpable omission conduct by imposing an abstract danger and

asking for the provision of positive obligations of a penal production that is based on the reasonableness of reliable parameters.

Such parameters take into consideration nomological factors, rules of experience that sufficiently entrust the existence of a scientific uncertainty to a danger created by a conduct that typifies the option in the sense that it penalizes the principles of offensiveness, proportionality, reasonableness of a path of determination, peremptoriness of the principle of guilt where it considers with greater reason the provision of obligations that are positive for criminal protection and in partem of the ECtHR.

There are also many difficulties on the part of the jurisprudence of the ECtHR, which tries to find ideas regarding the guilt that comes into conflict with domestic dogmatics. It uses terminological parameters of different legal traditions that correspond to certain dogmatic categories such as negligence, recklessness.

Scientific uncertainty, the application of the aforementioned models based on the event of damage and danger show in terms of causality and/or causal suitability the negligent omissions in a de iure condendo perspective in relation to liability for product damage, thus constructing risk offences as types of damage for a common danger, as causal links, where the imputation is probable for the event of damage and danger of the author based

on a degree of credibility that covers the application beyond any reasonable doubt.

Situational risk, as an epistemological logic is inspired by the objectives that are removed from a risk that recognizes the facts to an empirical evidence that suspects the existence of a risk that cannot continue to be such.

The risk offence is fragmented to a risk of an objective significance that is expressed to a propensity to damage, as a holistic control of the apprehension of the facts and evident signs. The risk has a physiognomy that adheres to the society in a relative analytical dimension, objective of a cultural interpretation that combines and guarantees the principle of offensiveness to an objective dimension of it.

The knowledge is relative to the risks that are linked to the performance of activities and presence of factuality of the damage that excludes the legitimacy and justification of a punitive intervention.

This offence is of a normative, inductive nature and has to do with the frequent diffusion of damage events, in the degree that they manifest themselves with each damage quantitative and qualitative criteria that are connected to time and territory with a sequential way of a risk between damage and the use of the product. Thus the intensity of the risk has a double ancestry of a socio-hermeneutic nature that is based on the homogeneity of

the damage and danger events that occur and that provide the relative indications of the type of damage as causes.

The normative nature at a level of criminal relevance leaves the legislator to identify the risk that includes the indicators and the relative presuppositions of a crime as the cause of events that are attributable to the relative conduct and objectives to be punishable.

Thus death and minor injuries from other people involved according to the principles of proportionality and subsidiarity of a criminal intervention exist at a predetermined increase in risk of explanations that are plausible as alternatives to an identified cause, such as a product that carries out its activities to an agent substance that has relative pathogenicity to epidemiological research that does not offer individual explanations but limits the risk of the relative task that has to do with the damage signals corresponding to the conformation of the risk.

The damage events are important and refer to a possible cause where the hermeneutic signs cause harmful effects related to the product that prevents the maintenance of a high risk as a safe alternative. As a driver the principle of proportionality excludes penalization. The harm caused carries out the asset of life and physical integrity that is inferior to the protection of those who ensure the aforementioned asset. The single verifiable damage event also decides for the omission assumed towards a situation

of a type that can be qualified as risk.

Within the “tatbestand” the risk for the illicit act, and/or the risk indicators are identified to verify the typical offense that reveals the legal good that protects the prerequisites of its constitutive-descriptive nature. It detects from the subjective point of view the requirement that recognizes its own risk. Thus the precautionary principle is the guiding criterion of a decision taken in relation to the conditions of uncertainty where the purposes of a logic at the maximum (maxmin) together with the decision that avoids the relative consequences that are worse is transfigured as a possibility that suspects the occurrence of harmful events and the possibility of explanation is reliable to the reasons.

The risk offence makes the “Pflichtdelikte” as the basis of a criminal disvalue of a violation of the obligation that protects the active, passive conducts as a guarantee that minimize the risk of a product that carries out the activity. The case describes the requirements of severity of a risk where the duty observes the conditions that determine, identify the operation of guarantee positions from protocols that manage the risk control and the structure of crime as a constrained form.

This type of offence admits as inevitable the relative weakness that occurs in the impossibility of its measurement. Therefore, it requires the provision of a reviewability to the res judicata of an

explanatory discovery of the damage that clarifies in a different way the risk for consumers as a political, legislative choice by the same legislator.

This offence characterises multiple subjects, where the active subject places the commission of complex organisations to decisions. This is the case of intervention of multiple subjects such as the passive one relevant to conducts that fall on individual legal assets of large categories of passive subjects. The proceeding to the decision results from the conscious psychological components of the active subject that has as its object the evaluation and management of risk.

Forms of guilt materialise in the decision that ignores the risk that is perceived in a correct way and evaluates the intensity of hybrid subjects such as recklessness.

In other words, it is a decision that continues to run the risk of negligence, imprudence and that underestimates the seriousness of a culpable paradigm in terms of gross negligence.

The functioning of the penalty for risk crimes creates a diachronic connection between the future and the present, which consists in the regulation of the relative control (Steuerung). This has as its objective suitable behaviors to translate the serious negligence of the risk and to establish the expectations of the behavior as a reactive function based on the auxiliary evaluation that is based on the fear that the effects spread the

mass victims.

The collective dimension identifies the illicit acts that make it necessary to resort to models that have to do with the risk of schemes of a scientific procedure where social actors are represented to define in advance the methods that respect the precautionary principle[8]. That is, to sectors where the risk is unknown and not of significant scientific uncertainty but based on the formation of consensus, to the public debate relating to the benefits, costs, collateral effects and to other possible alternatives where the choices relating to the identification allow and share in a conscious way the risk.

Politics through the withdrawal of blank delegation for managers in technological systems resolves conflicts of interest and the attempt to privatize risks. This process is like a private manager, where the different protagonists of a complex risk management are involved in public entities, where they prepare multidisciplinary bodies that evaluate the management of a technological risk, thus protecting those who represent a company at risk and that limit the discretion of each judge, that concerns the operations, that are carried out and that foresee the illicit to the typical risk.

This is for example a model that we find in the United States

8Communication from the Commission on the precautionary principle, Brussels, 2.2.2000, COM(2000) 1 final: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2000:0001:FIN:en:PDF

and that concerns the regulatory and risk control agencies by entrusting a wide range of specific scientific skills. This model is based on essential elements that consist of a regulation of a precautionary paradigm where it adapts to entities and organizations that operate in specific sectors that concern such discipline. Furthermore, the control of the legitimacy of the procedure develops rules that are compliant with the procedure of democratic values, namely the regulatory process, the downsizing of experts, the obligation of agencies that complicate and make judges protect the community.

This means that the right and responsibility of public authorities are formed according to the regulatory objectives, to parameters that identify for example the American sentence of Daubert entrusted to the ordinary judicial authority to annul administrative decisions, that are based on well-founded evidence, arbitrary such as the failure of an important aspect, where it explains the compliance, within a rigid and preventive enforcement.

Through inspections and injunctions it proposes a compliance model that offers the organization the possibility that subjects to sanctions in order to evaluate the risks carried out by a consultancy of experts, where the company through a protection program regulates the relative provisions as standards, that consist of the precepts, that cover the matters subject to the

competence of the relative agency and the procedures that are complex, precise to adopt the Emergency Temporary Standards, that have time limits for the application of ordinary procedures, as well as the guidelines, that are agile and respond to the needs of flexibility. This specific function supports and recognizes, controls the risks and the subjects to processes that are rapid for the adoption, modification and updating.

These are theoretical models, that find application to positive obligations of a substantial nature that specifies the previous work, i.e. the obligations that foresee behaviors suitable for danger and/or that damage legal assets in a manner appropriate to procedural obligations such as repressive investigations.

The court takes into consideration a structural line of two important points. On the one hand it takes into consideration the right to life that is based on art. 1 and 2 of the ECHR (Villiger, 2023). On the other hand we have the constraint of the state that adopts the measures that are suitable to prevent and protect the loss of human lives. So we speak for a precise right to prevention and on the other hand the commitment of the state authorities that are suitable to conduct the related investigations in a serious, timely, effective manner that impartially deepens the ascertainment individual responsibilities for violations of the right to life.

A second right referred to the obligation to investigate detects a

similar structure to the responsibility to protect and is foreseen at a global level according to the rules of international law. It is an obligation that is part of international criminal cooperation that includes prevention as a function of the obligation of a reconstruction that operates according to the jurisprudence of the ECtHR taking into consideration some sub-obligations.

We are talking about states that require the adoption of the relevant criminal provisions, where they foresee the voluntary commission of each subject.

The agent on behalf and in the name of state and private authorities puts the acts that harm and that expose the danger of the right to life of individuals as effective to a precise application.

The circumstances of the obligation of prevention according to art. 2, par. 1 ECHR requires the state to have special measures adopted within an operational plan, suitable to provide the protection of individuals who find a situation of risk recognizable to an identifiability of the subjects, where the state authorities are responsible for the object and the prisoner grants permission for the conditional suspension of the sentence preventing the commission of acts harmful or dangerous to the right to life of third parties, such as subjects of mental illness, where the danger from natural disasters of human activities and in situations of necessity manage the risk in the moment.

Negligent behaviors require the prevention of particular characteristics that take into account the auxiliary interventions of criminal law, considering as sufficient the extra-criminal remedies of negligence, of the proportions that go beyond the error of evaluation and lack of coordination, thus outlining a serious, systematic and widespread fault in the performance of state activities that endanger the integrity of a group of individuals.

These models are suitable and can be reconstructed from the jurisprudence of the ECtHR, where the dogmatic categories of individual responsibility, are conceived. This outlines the gaze that collective responsibility turns, within the scope of organizations that are complex, that is, the responsibilities of entities and organizational fault that intertwine the previously indicated negligence.

The theoretical reconstruction is specifically connected to a contrary event, where the conduct of the entity does not face the risk of the crime but differently from that of individual guilt, it is reasoned according to the nature of the agent who organizes, as a type of risk that thus identifies the type of event. This is how the roles that regulate the procedures that make the control of the activity of bodies and employees as obstacles to the commission of illicit acts are defined.

The complex structure coordinates the activity and the duty of

surveillance, controls the coordination of the top. This carries out in a personal way the mandatory forms for the organization of work that distances itself from a contrary event that does not have an abstract but general nature, that is, specifically connected to the respect of the principle of guilt in a perspective that guarantees, protects the legal assets that it takes into consideration.

The holistic and systemic dimension foresees and prevents offensive events that do not reflect in a structural, logical way the categories that are used and as a consequence affect the identification of guarantee positions that continue with an exclusive way of guaranteeing the culpable responsibilities, as a cause of means and powers of the individual who has the dimension of risks and dangers to prevent and reduce.

Within these contexts, the intertwining of collective and individual as an osmotic, interferential relationship, highlights the ratio of a reasoning that recognizes the violation of art. 2 ECHR in relation to negligent conduct that determines death, very serious injury that has endangered the victim, the failure to fulfill the positive obligation that protects and that provides the framework to regulate criminal intervention taking into account the implementation of tools that evaluate, assess the structural, systemic malfunction of services and structures for example of a hospital that involves the lack of access for a patient in times of

emergency to life-saving treatments and the state authorities who know the emerging risk that has omitted the necessary measures that prevent the material risk.

As the ECtHR itself also states:

"(…) the preponderance of the organizational component, leads to reconsidering the entire healthcare activity through the prism of responsibility for organizational deficit, both because, as has been stated for some time now, behind the majority of unfortunate events there seem to be shortcomings attributable to the structure, and because if we adopt a broader vision of the events, capable of extending to the context in which the activity is carried out, we realize that healthcare facilities, although presenting undoubted peculiarities due to the particular activity carried out, ultimately constitute real enterprises in the sense of complex organizations (…)" (Villiger, 2023)[9].

9ECtHR, Lopez de Sousa Fernandes v. Portugal of 19 December 2017 based on art. 2 ECHR of a substantive plan and relating to exceptional circumstances. Tülay Yildiz v. Turkey of 11 December 2018, para. 51, which the ECtHR affirmed that: "(…) respect for the rights protected by art. 2 in relation to a given case must be examined taking into account more general considerations relating to a prompt examination of the facts concerning a case of medical negligence that occurred within a hospital facility, which allows knowledge of the activities and errors possibly committed by doctors working within the facility, so as to be able to remedy potential shortcomings and prevent new errors of the same nature, with a view to ensuring greater safety for users of health services (...)". Yirdem and others v. Turkey of 4 September 2018, paras. 35-43. Marius Alexandru and Marinela Stefan v. Romania of 24 March 2020, para. 100, which the ECtHR affirmed that: "(...) principles similar to the context of the management of safety and risks in the context of road traffic by public or private entities, in a case in which the death of some individuals and serious injuries to the physical integrity of the applicant had occurred due to the fall of a tree that was at the edge of the road onto the car in which those individuals were travelling, stating that it cannot recognise that a single error of judgement or an isolated lack of coordination between different professionals, whether public or private, is sufficient to activate the positive obligations of criminal protection on the part of the state in relation to negligent conduct (...) requirement that the existence of a causal link be demonstrated between the structural and systemic deficit within the health system in question, or of some of its services in certain territorial areas, and the death or injuries suffered by the applicants (...)". Pitsiladi and Vasilellis v. Greece of 6 June 2023, para. 49, which the ECtHR noted that: "(…) to the singular case of a couple of parents who complained of a violation of the positive duty of protection arising from art. 2 ECHR in relation to the death of their child due to a serious illness, because of the obstacle created by the national legislation in force at the time of the facts, subsequently amended, to using the funds raised through a private charitable

Terms of risk and danger. Ambiguous criteria and/or synonymous use?

Risk is part of the positive obligations that decline and that lead back to the imminence of the presence on which they are based, as a position of guarantee of the state party and as the scope of a duty of diligence (Liakopoulos, 2020b).

The distinction between the notion of intense risk, danger as a basis of pre-understanding also of a pre-legal and not so much meta-legal nature is based synonymously on these terms. This is a position that does not take into consideration the different components of a conceptual nature that fall on a dogmatic framework level.

On the one hand we have a traditional approach that refers to human activities where it is difficult to distinguish from a structural point of view. The notion of risk and danger specify the process of structural nature of the notion of risk and danger as a long process to be identified in the legal field thus specifying the works of a particular revelation of the two different notions.

The terms that differentiate the use of the notion of danger in positive law are based on risk, the danger of the scope of possibility that connects human activity and the event that is

initiative to pay for the minor's treatment at a health facility in the United States of America, where he could have had access to highly advanced and sophisticated treatments, which do not exist either in Greece or in Europe (…)".

offensive to legal assets, ascertaining the danger of a basis where the circumstances relating to the implementation of the conduct and the verification of the event risk verifying the circumstances of elements that are pre-existing to the respect of the implementation of a conduct.

The event thus constitutes a constitutive element for the case, where the relative risk operates as an adequate risk. The hypotheses detect the danger where the approach is found to be divergent and that respects the reconstruction of positions. The risk allows an endosystemic perspective of the matter of risk that characterizes the multidisciplinary, multidimensional approaches towards perspectives that define the hermeneutic function of the incriminating function of the concept of risk.

The evaluative possibility of the effective capacity of controlling great dangers through criminal law does not take into consideration and does not involve other sciences, such as empirical ones. In front of the transformation of a traditional society, the categories of criminal law lead to the categories where the logic is identified by a global society and which thus represents a model for post-industrial societies.

Thus, the principle from a terminological point of view, has no conceptual basis. The difference between risk and danger presupposes and verifies the activity of exposing the danger on legal assets that need protection. Harmfulness is now a

prerequisite of activities that derive from the state of scientific knowledge without fully considering what is demonstrated in practice. The real and immediate risk is presented, through the jurisprudence of the ECtHR, as a positive obligation to protect the right to life, the target subjects, domestic violence, the prohibition of torture, inhuman and degrading treatments in the cases of expulsion and extradition as qualifiable in terms of risk and in a way that frames the risky danger, decided on different forms that have to do with health, technological, environmental, ecological risk.

A brief reflection on command liability from international criminal law

The theoretical models that we have seen from the previous paragraphs also have a basis that draws on international criminal law. It is a matter of a small scale of situations of human rights violations[10]. In collaboration with the ECtHR and international

10UN, World Summit del 2005 (Risoluzione n. 60/1) (https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml#:~:text=Paragraphs%20on%20the%20Responsibility%20to%20Protect&text=Each%20individual%20State%20has%20the,through%20appropriate%20and%20necessary%20means) which was referred the relevant notion of the responsibilty to protect as evolution of the reports of the general assembly of the General Secretary, n. A/63/677, of 12 January 2009, Implementing the responsibility to protect: (…) the protection responsibilities of the state, International assistance and capacity-building, Timely and decisive response; n. A/64/864, of 14 July 2010 in Early warning, assessment and the responsibilty to protect; n. A/66/874-S/2012/578 of 25 July 2012, Responsibility top protect: timely and decisive response; n. A/67/929-S-2013/399 of 9 July 2013. Responsibility to protect: State responsibility and prevention; A/68/947-S/2014/449 of 11 July 2014, Fulfilling our collective responsibility: international assistance and the responsibility

courts (Schabas, 2011) they are in a consonant spirit as a general analogy provided by national law that develops and differentiates on the level of sanctions (Triffterer, 2004)[11] and that specifies the contributions that are relevant to the forms that participate in the cases of the Joint Criminal Enterprise that characterize the measure of indeterminacy that applies the difficulty to distinguish the hypotheses of command liability, of superiors by way of complicity as crimes that follow subordinates and/or even omissions.

The liability of the superior as a competitor due to the relative command involves the risk of applying the evidentiary requirements that presume the behaviors by superiors that translate into forms of liability that take a position for the actions of others.

It is specified that the possible misunderstandings concern the liability by command to a formulation according to art. 28 of the statute of the International Criminal Court (ICC), where it

to protect.

11Triffterer affirms that: "(...) a differentiated model (...) cannot fail to influence, moreover, the measurement of the penalty, especially where an interpretation of the different forms of participation is accepted not in a strictly formal key, but rather teleological, in consideration of the different role assumed in the offense to the protected interest and therefore in consideration of the different typified disvalue, in compliance with the principles of guilt and proportion. It does not express itself clearly in the sense of accepting a differentiated model, although it underlines how the choice of a typification of the objective modalities of participation, rather than of the characteristics of the different figures of competitors, leaves no doubts about the will of the international legislator to ensure a certain standard of determinacy of the normative description, beyond the different techniques followed by the main national systems (...)".

adheres to and represents an omission case provided by each national legislator for the non-emergent event that includes, as a general clause as we have seen in art. 13 and 40 of the German Criminal Code and as a special case according to art. 28 of the ICC statute, the relative cases that provide for individual crimes for the complementary jurisdiction of the ICC that respects the domestic courts (Ambos, 2022)[12].

The typification model is based on the domestic level, on the need to reconcile the general principles of criminal law, such as a domestic regulation where the defendant state proposes to go beyond the hermeneutic parameter of a conventional interpretation of the same domestic legislation.

It is an international criminal justice system that integrates the intervention of the Court and domestic criminal courts. It defines the systems that contribute to forming the rules. The solution of a single case loses the reason for a configuration, where the construction is suitable and reconnects the basis of explicit or less explicit principles and the provisions are contained in the set of interacting parts.

Thus, the provisions proposed by the statute of the ICC in domestic legal systems concern the verification of a model that seeks to reconcile the general principles of law relating to criminal liability on the objective and subjective level.

12According to art. 17 of the statute of the ICC: "(…) unwilling or unable to genuinely carry out the investigation or prosecution (…)".

In this regard, we see in the German legal system the omissive co-participation, that is, the complicity through omission of a commissive crime which is regulated by art. 13 of the German Criminal Code[13].

Furthermore, international crimes are applied by the various provisions of par. 2 of the German International Crimes Code (VstGB), as a coordinate of the rules of art. 14 of the German Criminal Code (StGB) much criticized by applications that are connected with the German civil code, the "mittelbare Täterschaft" which is expressed in the "Organisationsherrschaft" which elaborates the formulations of Roxin of a punitive, administrative nature related to the surveillance obligations (Aufsichtspflichten) as they come from par. 130 OWiG[14].

13See par. 13 StGB Begehen durch Unterlassen-(1) Wer es unterlässt, einen Erfolg abzuwenden, der zum Tatbestand eines Strafgesetzes gehört, ist nach diesem Gesetz nur dann strafbar, wenn er rechtlich dafür einzustehen hat, dass der Erfolg nicht eintritt, und wenn das Unter- lassen der Verwirklichung des gesetzlichen Tatbestandes durch ein Tun entspricht. (2) Die Strafe kann nach § 49 Abs. 1 gemildert werden.

14See par. 130 StGB-Verletzung der Aufsichtspflicht in Betrieben und Unternehmen. (1) Wer als Inhaber eines Betriebes oder Unternehmens vorsätzlich oder fahrlässig die Aufsichtsmaßnahmen unterlässt, die erforderlich sind, um in dem Betrieb oder Unternehmen Zuwiderhandlungen gegen Pflichten zu verhindern, die den Inhaber als solchen treffen und deren Verletzung mit Strafe oder Geldbuße bedroht ist, handelt ordnungswidrig, wenn eine solche Zuwiderhandlung begangen wird, die durch gehörige Aufsicht verhindert oder wesentlich erschwert worden wäre. Zu den erforderlichen Aufsichtsmaßnahmen gehören auch die Bestellung, sorgfältige Auswahl und Überwachung von Aufsichtspersonen. (2) Betrieb oder Unternehmen im Sinne des Absatzes 1 ist auch das öffentliche Unternehmen. (3) Die Ordnungswidrigkeit kann, wenn die Pflichtverletzung mit Strafe bedroht ist, mit einer Geldbuße bis zu einer Million Euro geahndet werden, Ist die Pflichtverletzung mit Geldbuße bedroht, so bestimmt sich das Höchstmaß der Geldbuße wegen der Aufsichtspflichtverletzung nach dem für die Pflichtverletzung angedrohten Höchstmaß der Geldbuße. Satz 2 gilt auch im Falle einer Pflichtverletzung, die gleichzeitig mit Strafe und Geldbuße bedroht ist, wenn das für die Pflichtverletzung angedrohte Höchstmaß der Geldbuße das Höchstmaß nach Satz 1 übersteigt.

These are structures of an omission crime that build a model of abstract danger with a light sanction regime. The provision attributes a liability that is susceptible and applies the pecuniary sanction to the owners of a company, a business where the intent and the fault even if they are omissions, the surveillance control measures are necessary to avoid the illicit activities that are in conflict with the obligations that burden the owner of the business that punish the criminal sanction of a pecuniary type. The fulfillment of surveillance obligations has prevented in a reasonable and difficult way the verification of such illicit activities.

They are provided for in the cases that have as a basis to put in the transport stage the provisions of the ICC in the sector of responsibility from command and on the domestic level (Völkerstrafgesetzbuch), par. 4[15], which seeks to derogate the application of a discipline that is provided for by par. 13, letter. 2 thus avoiding applying the treatment of sanctions.

Par. 14 (Heine, Weisser, 2019)[16] is similar with that provided for

15See par. 4 VStGB Verantwortlichkeit militärischer Befehlshaber und anderer Vorgesetzter. (1) Ein militärischer Befehlshaber oder ziviler Vorgesetzter, der es unterlässt, seinen Untergebenen daran zu hindern, eine Tat nach diesem Gesetz zu begehen, wird wie ein Täter der von dem Untergebenen begangenen Tat bestraft. § 13 Abs. 2 des Strafgesetzbuches findet in diesem Fall keine Anwendung. (2) Einem militärischen Befehlshaber steht eine Person gleich, die in einer Truppe tatsächliche Befehls-oder Führungsgewalt und Kontrolle ausübt. Einem zivilen Vorgesetzten steht eine Person gleich, die in einer zivilen Organisation oder einem Unternehmen tatsächliche Führungsgewalt und Kontrolle ausübt.

16See par. 14 VStGB Verletzung der Aufsichtspflicht-(1) Ein militärischer Befehlshaber, der es vor- sätzlich oder fahrlässig unterlässt, einen Untergebenen, der seiner Befehlsgewalt oder seiner tatsächlichen Kontrolle untersteht, gehörig zu

by par. 130 (Werle, Jessberger, 2020) and 357 of the German Criminal Code, which punishes with a broad autonomy the scope of administration of an official responsible for the control, the surveillance that consciously allows the subjects, who are subordinated to commit crimes to treat subjects for legal powers in fact that prevent such types of activities[17]. So we can speak for another failure to report according to par. 15[18].

The German legislator, according to par. 4 of the German Criminal Code, responds to the crimes provided for by the same VstGB by consciously allowing subordinates to commit the crimes (wie ein Täter) (Weigend, 2018) and at the same time denying the regime of sanctions that are more modest, as provided for by par. 13, letter 2 of the German Criminal Code.

They have to do with the related conducts of omission. Thus, the

beaufsichtigen, wird wegen Verletzung der Aufsichts- pflicht bestraft, wenn der Untergebene eine Tat nach diesem Gesetz begeht, deren Bevorstehen dem Befehlshaber erkennbar war und die er hätte verhindern können. (2) Ein ziviler Vorgesetzter, der es vorsätzlich oder fahrlässig unterlässt, einen Untergebenen, der seiner Befehlsgewalt oder seiner tatsächlichen Kontrolle untersteht, gehörig zu beaufsichtigen, wird wegen Verletzung der Aufsichtspflicht bestraft, wenn der Untergebene eine Tat nach diesem Gesetz begeht, deren Bevorstehen dem Befehlshaber ohne weiteres erkennbar war und die er hätte verhindern können.

17See par. 357 StGB Verleitung eines Untergebenen zu einer Straftat- (1) Ein Vorgesetzter, welcher seine Untergebenen zu einer rechtswidrigen Tat im Amt verleitet oder zu verleiten unternimmt oder eine solche rechtswidrige Tat seiner Untergebenen geschehen läßt, hat die für diese rechtswid- rige Tat angedrohte Strafe verwirkt.

18See par. 15 VStGB Unterlassen der Meldung einer Straftat - (1) Ein militärischer Befehlshaber oder ein ziviler Vorgesetzter, der es unterlässt, eine Tat nach diesem Gesetz, die ein Untergebener begangen hat, unverzüglich der für die Untersuchung oder Verfolgung solcher Taten zuständigen Stelle zur Kenntnis zu bringen, wird mit Freiheitsstrafe bis zu fünf Jahren bestraft. (2) § 4 Abs. 2 gilt entsprechend.

structure equates omission (Weigend, 2018; Werle, Jessberger, 2020) and detects in a hybrid way the omission that is expressed by the legislator himself (Vogel, 2013).

The military conduct or that of a civilian superior that is connected with eventual intent has to do with the relationship of superordination that is connected to the conduct of the military commander and the civilian superior.

It is a formal, legal assignment of command functions that operate to a specific assessment of powers that are connected to a civilian organization and/or a company. But according to the cases provided for by par. 1, the hypotheses of command that formally and legally attribute to a subject the exercise of his own powers of command are the authorities towards subordinates that are binding.

In this way, the configurability of responsibility by command violates the prohibition of liability for the actions of others. Thus, a distinction is made between military commanders and civilian superiors, between effective powers of command and effective powers that exercise a relative authority (Weigend, 2018)[19] that is connected with the effective control of the orders of the commander or the civilian superior for actions carried out

19According to Weigend: "(…) distinction between the different sources of control exercised over subordinates, coming, in the first case (Befehlsgewalt), from the same command structure typical of military formations (regardless of the legal or formal recognition of such formations), and, in the second case (Führungsgewalt), from the personal characteristics, charisma and personality of the subject within a certain group (…)".

by subordinates even against their will.

Art. 28 of the statute of the ICC differentiates from a subjective point of view the responsibility of military commanders and civilian superiors and finds broad recognition in the formulation of par. 14 VStGB for the categories of subjects that within the scope of par. 3 are similar to the hypotheses of wilful omissions that prevent wilful omission co-participations, the dogmatic reconstruction that respects this type of hypothesis, international crimes committed by subordinates, military commanders and civilian superiors (Weigend, 2018).

The interpretation of the provision, according to para. 4 VstGB, as a lex specialis and para. 13 StGB which has integrated the omission co-participation are issues that are relatively problematic to the existence and the position of guarantee (Garantenstellung).

This position controls as a source of danger and in the head of the civil superiors with regard to economic criminal law thus making the concept of the Unternehmen and/or zivile Organization as a norm. It specifies at a comparable level the de facto civil superiors who indicate the nature of the crimes that comply with the obligations of prevention as a necessary restrictive interpretation of the category of civil superiors.

In this way, it limits the subjects who hold a position comparable to military commanders who are based on the

following assumptions. The civil organization, where the company carries out the activities, that characterize the recognized danger for the legal assets, are protected by international criminal law and the control of the superior. The subordinates are similar to a military commander with his troops.

Accepting an interpretation of small businesses, associations of a limited number of members, who are not able to put the danger to the legal assets, are characteristics, that lead to the exclusion of the provisions of par. 4, which finds application to the economic criminal law with the consequence, that it makes the hypothesis of the sector applicable. The mitigation of the penalty is thus provided by lett. 2 of par. 13 StGB.

It is observed that the scope of application according to art. 28 of the statute of the ICC provides for a different approach, which tends to correspond to the notion of military commander and civilian superior, which in fact exists in a relationship between superior and subordinate, where a direct hierarchical organization is founded with the aim of issuing to the superior his own and true orders towards subordinates thus founding an expectation of orders which are obeyed as the power of control, i.e. the discipline of subordinates who exercise in an effective and significant way the imposition of disciplinary measures which transmits the relationship between the competent

authorities involved.

Ascertaining, examining and checking the causal link between the failure to prevent the superior and the commission of crimes by subordinates shows, that the superior takes into account the legacy of an experience that adopts reasonable, material measures first of all based on a position of command and authority, where the act of the subordinate is avoided. Thus, it is sufficient to ascertain that the superior makes it more difficult or less probable for the subordinate to commit the act, which is relative in practice with the standards of the increase, decrease of risk.

The transposition of German criminal law in the provisions that include as prerequisites the requirements that are stringent to compliance with international criminal law through the jurisprudence of the international criminal tribunals prevails over an orientation, where the flexibility of the standard, that ascertains the causal link, is inclined.

In a necessary way the parameter of increase, decrease of risk is verified, considered implicitly as existing and in the presence of an omission behavior that is no longer due to the violation of the rule that sets the limits of caution in the moment of the culpable hypotheses.

The causal link in improper omission crimes is presented as a judgment of a hypothetical nature. The production of the event

in the case of crimes committed by subordinates characterizes the difficulties of ascertaining the effort that verifies and that presupposes the subsumption of laws of experience as a general causality based on parameters where they repeat over time the affirmation of a high degree of credibility from the domestic point of view and excluding the causal courses as alternatives.

The scientific law finds in the maximum experience a concrete case with an effective way of an application of a precise situation, as individual causality beyond any reasonable doubt as certainty from the procedural point of view.

As regards the event that does not prevent the commission of an act provided for by a criminal offence as per the VstGB and according to par. 14 VStGB anticipates the commission of an act that constitutes as a criminal offence what is provided for by the VStGB under the orders of a superior that could be prevented by the commander himself and/or by the superior as aware of a fact that subordinates the execution that provides what is fulfilled by obligations of diligence that derive from the position of command, the authorities that have an effective control over the subordinates to orientations that are relational with the structure of the relevant provision. Thus one reconstructs one's own omission within a context, where the commander punishes the violation of the obligation of control, the supervision that represents with a consequent manner the crimes for the

subordinates, as objective conditions for punishability and to a direction.

The when of the "Untergebene" reconstructs in terms of improper omission an "unusual" unauthorized acts within a crime of the subordinate that does not present, from an external point of view, a typical fact to an event that is connected on an objective level. The legal, material possibility that prevents above all the subjective one recognizes the imminence of a commission of crimes by subordinates to a behavior of the commander and/or superior (Weigend, 2018).

This hypothesis does not have to do with the inertia of the commander but with the commission of the fact that subordinates. Thus, it causes an unexpected behavior from a superior that he plans to avoid. Also, the existence of a causal link is demonstrated between the violation of the obligation and the fact that the subordinate verifies that the crime of the subordinate has already occurred at the time that the commander, and the superior holds a relative necessary conduct, given that he exercises the powers of command and control in an appropriate manner. This means that the causal link of a hypothetical type is sufficient.

The prerequisites for the omission of the superior that are based on a violation of a legal obligation (Rechtspflicht) exist in a normative connection. The "Zurechnungszusammenhang"

imputation link that is connected between the violation of the obligation to control and the fact of the subordinate recognizes in a precise way the risk of violations of rules that should have been prevented.

It would be necessary for the assessments that are more accurate and relative to the existence of such a connection to report the case where the commander or the superior fails to replace subordinates with a command at the prison camp and in case he knows that they have not had a training in a compliant treatment for the human rights of the prisoners at the time they commit looting in the prison camp. Thus, the fact that it is committed by subordinates and that it concretizes the risk of abuse, mistreatment, violence, torture against prisoners seems to be missing.

The precautionary rule tends to prevent the application of the theory of objective imputation of an event that is widely spread especially in the German criminal law system and in intentional crimes.

The violated control obligations have to do with the commander, superior where according to letter 2 of par. 14:

"(…) a) knows that he has this role towards the subordinate who is about to commit the act; b) knows, consequently, that he is obliged to carry out a control towards the latter; c) is aware of the circumstance of not adequately fulfilling his control obligations towards the subordinate; d) could foresee using the necessary diligence, which must be assessed on the basis of his knowledge and experience, that the subordinate would commit an act recognizable in broad terms as a crime foreseen by the VstGB itself (…)

(Weigend, 2018)".

In this way, a difference can be noted from the subjective point of view. The similar discipline provided by art. 28 of the statute of the ICC between military commander and civilian superior is related and limited to cases of intent, gross negligence, violation of the obligation of control that makes the related crimes committed by subordinates foreseeable (ohne weiteres erkennbar).

These types of conduct are difficult to be approved for a malicious paradigm, i.e. of eventual intent where the formulation of art. 28 of the statute of the ICC as a tool for hermeneutic support (consciously disregard) responds to the "most important exception" of information thus describing a process of a psychological nature which characterizes the superior as having acted according to and in the sense of "dass er die Tat als reale Möglichkeit vorhersah, aber "nicht ernst nahm" oder "auf ihr Ausbleiben vertraute"", as a consequence of being able to widely predict with a broad manner (ohne weiteres erkennbar) even the actions of the same superior which he did not foresee (Taten, die der Vorgesetzte nicht erkannt hat).

This is a case of an auxiliary nature to the conduct of moral and material participation of the commander, the superior in the crimes of subordinates according to par. 4 VstGB.

In the German context, the difference between incriminating hypotheses and adoption, as for example, in the Austrian, Swiss,

Spanish legal systems[20] provides for a more modest treatment of sanctions for serious misconduct and conduct that fails to adopt measures necessary to prosecute crimes committed by subordinates[21]. This is a formula of art. 28 of the statute of the ICC that is also chosen by the British legislator[22].

The choice to follow the international crime code was a German reality that concerns the responsibility of command with various hypotheses that take into consideration structures that are connected with the adoption of preventive, impeding measures, as well as with punitive, repressive measures of a psychological attitude.

The theoretical models, both the criminal and the international ones, do not have to do with an inadequate mutation that takes into account international crimes within contexts that can be configured as crimes against humanity and against war and that respect the object of violations of positive obligations where states recognize the ECtHR as having the characteristics of diffusion, systematicity, verification in times of war of rules of international criminal law.

These are characteristics where international crimes are committed by multiple people, organized structures of a political, military type despite the personal nature of

20See parr. 321g-321i ÖStGB and art. 264k schw.StGB.
21Art. 615 bis of the Spanish criminal code.
22See the section 65 of the International Criminal Court Act of 2001.

responsibility that is described by the same statute, where the reference of each institution is used according to the objectives of a theoretical model and the interpretation of subjective requirements that have to do with the reasons adopted and adequated[23].

International Criminal Courts, Application and Responsibility of Command

The ECtHR and the ICC in the area of the command by superior note a certain similarity in the jurisprudential "dialogue" between the courts. The respect of the general discipline especially in the matter of mens rea (Moerner, Shapiro, 2023) and of art. 30 of the statute of the ICC (Ambos, 2022) allows us to speak for an admissibility of the formulation of a provision. It precisely applies the unless otherwise provided outside of any perplexity regarding the hypotheses of realizing international crimes in a multi-subjective way.

In this way the risk of typical forms is emphasized. Such guilt assumes in the matter of international crimes and with a critical way the respect of every attempt at extension. In this regard, the ICC puts the concept of the intent as a contrast to the principle of legality. Since there is no shared definition of the forms of

23ICC, Katanga and Ngudjolo Chui, 01/04-01/07, Decision on the Confirmation of Charges, PTC, 30 September 2008, par. 501: "(…) crime falling within the jurisdiction of this Court […] will almost inevitably concern collective or mass responsibility (…)".

guilt that are different from direct intent within different legal traditions, they are critical because of the relative silence of the norm regarding the evident renunciation of the international legislator.

The definitional attempt was the choice that includes the heterogeneity that exists in different legal traditions that makes it difficult to identify sufficient contents that are comprehensible within the scope of a common provision of an inevitable value of harmonization.

Intent as a further tertium genus of guilt appears to pre-exist the heterogeneity that leads to every problematic heterogeneity. Not taking a position thus produces a result that determines the interpretations of a variable geometry that depends on a different legal formation of judges. They apply provisions of the statute of the ICC that place a configuration of subjective attitudes that are intermediate between guilt and intent.

The psychological element outlined by the statute of the ICC concerns a configurability of crimes that reflect the subjective standards that are part of art. 28 of the statute of ICC (Liakopoulos, 2018; Liakopoulos, 2019a) as it has also been foreseen by the ad hoc criminal tribunals as a minimum requirement of a subjective imputation for crimes that are connected with the dolus eventualis.

The concept foreseen by the common law of the recklessness

suitable to act to a psychological attitude that has led the efforts, that systematically reconstruct the subjective element of international crimes is approximated to terminological choices, that are related to the identification and qualification of the mens rea, as a general provision of subjective imputation of statutes of the ad hoc tribunals, that thus establish the individual responsibility for the serious violations of international law within the mirror of a subjective element that describes the incriminated behaviors.

It is thus possible to say that the consciousness that accepts every probability and possibility that produces the relative typical consequences at a level of proof by the prosecutor is sufficient. He thus demonstrates that prevention by a hypothetical subject who found himself as an agent shares the same needs of the facts.

Moreover, the precise and punctual evidence of an acceptance of a typical event of the crime automatically deduces that the objective entity of the risk is aware to realize such an advertent reckelssness (Liakopoulos, 2019b).

The definition of the subjective element that appears in art. 30 of the statute of the ICC represents a much more advanced level relative to the mental element that respects the ad hoc tribunals not only from the point of view of the statute but as a combination of legal traditions that are different and that require

constitutive elements of factual cases. In this way, the expression with intent and knowledge assumes a compositional basis that represents not only the will of a subject but also of intent[24].

These are components that are connected to an intent where the conduct of the voluntary attitude of an agent is integrated with a behavior that requires a representation of factual elements of the same by referring to the awareness of the agent, who produces his own conduct in the ordinary course of the events. Thus, knowledge is defined as a type of awareness of the fact that follows a path that produces in the ordinary course of events (Horder, 2019; Ormerod, Laird, 2021)[25], a formulation that

24ICC, Katanga and Ngudjolo Chui, 01/04/-01/07, Decision on Confirmation of Charges, PTC, par. 529; Bemba Gombo, 01-/05-01/08, Decision on the Confirmation of Charges, PTC, 15 June 2009, par. 357.

25Ormerod and Laird affirmed that: "(…) on the Wollin case [1999] AC 82: if D. foresaw the relevant consequence as virtually certain the court is entitled to find intention (...) the court is entitled to infer intention which has not excluded at the root, however, a certain flexibility in the application; a second problem, more relevant for our purposes, concerns the threshold of certainty of the agent's prediction of the event necessary to consider the psychological coefficient of intention integrated, which, by progressively moving away from certainty to touch the threshold of high probability, can degrade into recklessness (…)". Horder notes that: "(…) the core of the concept of intention [is] acting in order to bring about the result (…) referring to the interpretative outcomes of the ruling of the House of Lords in the case R v Mohan [1976] QB 1 (…) the possibility of relating oblique intention, as a psychological attitude corresponding to the certain prediction of the event, to intention in the strict sense, it is underlined how it has been the subject of debate also in British doctrine, resolved positively by the majority of authors and by the Law Commission, N. 304, Murder, Manslaughter and Infaticide, 2007, par. 3.27, according to which the concept of intention includes the psychological attitude of someone who thought that the result was a virtually certain consequence of his or her action as specified (…) the difficulties arising from the absence of a univocal interpretation of the concept of oblique intention within the jurisprudence, which brings with it the risk not only of divergent applications, but also of legitimising, through the more or less broad interpretation of this concept, surreptitious moral judgements on the conduct of life of

clearly sets out the forms of intent that are permitted and that correspond to intentional and direct intent except for the cases where liability by command is provided for according to art. 28 of the statute of the ICC (Liakopoulos, 2018; Ambos, 2022).

The common law and knowledge systems tend to show in an autonomous way the relative criterion of imputation, which is subjective and which does not coincide with the representation, which attributes a weight of a preponderant nature, thus implying that the dynamic desire coincides with the form of direct intent and within the penal dogmatics in the civil law systems without the knowledge of the fact being sufficient, which involves the foreseeability of an event, where the certainty of the agent with the relative conduct produces the event and the relative consequences of a harmful and dangerous nature.

The measure of uncertainty continues to remain on the concept of intention, where the jurisprudence unfortunately either does not take a position and/or is very vague. Thus, the core of agreement of traceability of element of the hypotheses, which corresponds to the intentional intent makes the subject to act with the aim of understanding the intention and the direct intent as a hypothesis where the agent has reacted and behaved as highly probable or virtually certain. In this way, the production

the acting subject (…)".

of the event pursues a different objective. It is also found that the issues are doubtful and the scope of the rule is emerging and applicable to the jury.

This problem concerns the binding nature that recognizes the intention, that is, a prediction of a virtual nature where the event occurs, within the pronouncements that confers a certain margin of discretion, that resolves the recognition, that it has to do with a greater constraint.

This is an interpretation that is based on a formula of the same art. 30 according to the use of the expression “will occur”. The agent's need certainly represents the production of harmful consequences that arise from the relative conduct. Thus the international legislator operates and selects in a typical way the criteria, requirements of subjective imputation that are known at a comparative level, international as a parameter of intensity where the links of pre-existing concepts are peculiar to legal traditions, understandable for every legal system that highlights subjective facts for the international jurisdiction of a complementary type on the subjective level.

It is seen that the definition of the statute of the ICC respects the criminal types and the active subjects where they correspond to the individuals who have covered the level of awareness, “will” that respects the facts realized as an operation of the principle of complementarity and collaboration of a domestic and

international type of repression. Thus, any difficulty has to do with the discretion that national judicial authorities are given to punish the individuals who are perpetrators of a crime of eventual and common intent in the face of widespread responsibility that characterizes criminal events at an international level.

This is an interpretation that clearly defines the concepts of intent and knowledge in relation to the recruitment and use of child soldiers, the referral of the agent to the relevant accusation (confirmation of charges) according to the assumption of awareness of the risk that verifies the criminal offences that realise the criterion of a subjective imputation of eventual intent and which thus accepts the acceptance of the risk as a parameter for ascertaining the existence of a crime where the conclusions coming from the jurisprudence of the ad hoc tribunals are a precise formula of art. 30 of the statute of the ICC.

We recall the Bemba Gombo case[26] for crimes against humanity and war crimes committed in the Central African Republic by a contingent of troops of the Congo Liberation Movement under

26ICC, Pre-Trial Chamber II, 15 June 2009, n. ICC-01/05- 01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of The Prosecutor Against Jean-Pierre Bemba Gombo, par. 135, which is affirmed that: "(…) the Chamber takes the view that article 30 of the Statute encompasses two forms of dolus, namely dolus directus in the first degree and dolus directus in the second degree. This interpretation applies to all specific acts as crimes against humanity as referred to in article 7 of the Statute, as well as to all specific acts of war crimes listed under article 8 of the Statute (…)". ICTR, Akayesu, caso n. ICTR-96-40-T, 2 September 1998, par. 282; Kamuhanda, case n. ICTR-95-54°-T, 22 January 2004, par. 345; Ntakirutimana, n. ICTR-96-10 and 96-17-T, parr. 353-369.

its control.

It has been stated that art. 30 of the statute has exclusively attributed the intentional and direct intent, excluding also the eventual intent of forms that are significant to the psychological sector, foreseeing the relevance that argues from the interpretative point of view the respect of the principle of legality according to art. 22 of the statute of the ICC and the formulation of the categories of eventual intent and recklessness, thus specifying those that can be assessed in the near future (should be further considered)[27].

Responsibility is presented as a demonstration where the subject is less aware of the development of events in the ordinary course of events, i.e. the commission of crimes as a virtual consequence of a virtually certain consequence of the relative conduct that realizes the contributory liability.

In the Bemba Gombo case[28] the conduct was circled to a

27ICC, Pre-Trial Chamber II, 15 June 2009, n. ICC-01/05-01/08-424, par. 367: "(...) the provision relating to the definition of advertent reckelssness, considered as the counterpart of eventual intent within the common law systems, remained within the projects under negotiation until it was definitively removed by the Working Group on General Principles of Criminal Law in Rome (...)".

28ICC, Prosecutor v. Bemba, ICC PT Ch. II, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009, par. 405. Prosecutor v. Mucić et al., ICTY T. Ch., 16 November 1998, par. 333, Prosecutor v. Mucić et al., ICTY A Ch., 20 February 2001, par. 198, Prosecutor v. Aleksovski (Case No. IT-95-14/1-T), ICTY T. Ch., Judgment, par. 67. Prosecutor v. Halilović, ICTY T. Ch., Judgment, IT-01-48-T, 16 November 2005, par. 293. Prosecutor v. Halilović, ICTY T. Ch., 16 November 2005, par. 54. The connection between the responsibility of the superior and the gravity of the "principal crime" is further developed in the Hadžihasanović Appeal Judgment: Prosecutor v. Hadžihasanović (Case No. IT-01-47-A), ICTY A. Ch, Judgment, 22 April 2008, parr. 312-318. ICC, Prosecutor v. Muthaura, Kenyatta,

decision that confirmed the charges. The prosecutor himself relied on the hypothesis of complicity according to art. 35, par. 3 of the statute of the ICC and on the hypothesis of responsibility by command of art. 28 of the statute of the ICC for crimes committed by subjects who are under an effective command of a superior[29] and certainly proven at the relevant level of judgment[30].

In the Appeal Chamber everything was based on the assumption that the trial chamber did not apply the relevant institute under examination according to the psychological verification of the accused and to the respect of the commission of crimes by subordinates and the predisposition of the accused for the

Hussein Ali, ICC-01/09-02/11-382, 29 January 2012, par. 297. ICC, Prosecutor v. Ruto, Kosgey, Sang, ICC-01/09-01/11-373, 05 February 2012, par. 292. ICC, Prosecutor v. Al Mahdi, ICC-01/12-01/15-84, 24 March 2016, par. 24. ICC, Prosecutor v. Ntaganda, ICC-01/04-02/06-309, 14 June 2016, par. 104.

29ICC, Trial Chamber III, 21 March 2016 of n. ICC-01/05-01/08-3343, Judgment pursuant to art. 74 of the Statute, parr. 172-174: "(...) qualifies this institution as a title of responsibility sui generis, for which the commander and the superior are autonomously responsible with respect to the subordinates who materially commit the crimes foreseen by the statute, also recognizing the possibility that these subjects are responsible for different titles, which can be added to that of responsibility from command. Particularly critical of this practice, which would derive from the defect of the birth of the institution of responsibility for command, as a hybrid liability not for one's own actions due to one's own omission, but for the acts committed by one's subordinates, according to the widely prevalent interpretation in international jurisprudence, which would determine an evident confusion of levels between direct (competitive) responsibility and responsibility for command, also due to the lack of significance attributed by jurisprudence to the causal link between the conduct of the individual and the typical fact in the assessment of criminally relevant competitive contributions (...) a different interpretative approach had been outlined, which framed this institution as a dereliction of duty, existing in the presence of a reprehensible failure to perform an act required by international law (...)".

30ICC, Trial Chamber III, n. ICC-01/05-01/08- 3343, Judgment pursuant to art. 74 of the Statute of 21 March 2016.

relevant measures necessary for the prevention of these crimes.

The Pre-Trial Chamber from an objective point of view considered the command, effective control of the authorities by the commander or superior over subordinates[31] classifiable and in relation to the hierarchical manner of the superior, subordinate[32].

The causal link between the activation of the control in these subjects and the commission of crimes was a prerequisite for the relative decision due to the causal link that qualified in terms of condition the terms that increase the risk for the troops, that commit the crimes and the circumstances of an interpretation

31ICC, Pre-Trial Chamber of the same Trial Chamber III, which is affirmed that: "(…) the term command is defined as the authority, understood as the power or right to give orders and ensure obedience, especially over armed forces, without this terminological difference having any effect on the need to demonstrate a different level or standard of control, but rather on the manner, the way, or the nature by which the commander or superior actually exercises control over his forces (…)".

32ICC, Trial Chamber III, 21 March 2016, No. ICC-01/05-01/08-3343, paras. 184 and 188: "(…) the Chamber concurs with the Pre-Trial Chamber's view that "effective control" is "generally a manifestation of a superior-subordinate relationship between the commander and the forces or subordinates in a de jure or de facto hierarchical relationship (chain of command) (…) lists some factors that may be taken into consideration in assessing the existence of effective control, identifying them as the following: (i) the commander's formal position within the military structure and the actual tasks he carries out; (ii) the power to issue orders, including the ability to order forces or troops under his command to engage actively in hostilities; (iii) the ability to ensure obedience to orders, including the consideration of whether orders are actually carried out; (iv) the ability to make changes within the command structure; (v) the power to promote, replace, remove, or discipline any member of the force and to initiate investigations; (vi) the authority to send troops to places where fighting is taking place and to order their withdrawal at any time; (vii) independent access to and control over means of warfare, such as communications equipment and weapons; (viii) control over financial resources; (ix) the ability to represent the force in negotiations or interact with external bodies or individuals on behalf of the group; (x) the ability to represent the ideology of the movement to which subordinates adhere, by assuming a certain profile, manifested through public appearances or statements (...)".

that in practice relates to omissions such as that of the commander.

This is an interpretation that is also used in the jurisprudence of the ICC. In it, the risks of the prohibition of liability for the actions of others are shared and highlighted. The principle in dubio pro reo considers the terms of application of an objective attribution of the event for subordinate crimes that increase the risk in an exclusive and limited manner of events that are objectively attributable to the commander and also maintaining the need to ascertain the omission of the control of a condicio sine qua in crimes that are verified in a precise manner starting from the assumption that there is an effective control of the forces.

The relative standard used is that not only of actual knowledge that has been assimilated to the same level with the willful blindness of the common law systems but also of the consciously disregard information, which clearly indicated, that subordinates were committing or about to commit such crimes.

The subordinates have committed crimes that were not presumed to be proven by direct circumstantial and/or indirect evidence that must represent direct evidence as well as the admission of the officer who knows the crimes and the related statements. Such awareness has to do with sectors of the commission of crimes, where the circumstance of the

commander is informed by the forces, the control involved in the illicit activities in a broad and widespread manner.

The time span between the commission and the number of forces that are involved has to do with the tools that are available, the modus operandi of the conducts as well as the scope, the nature relative to the position of the superior where hierarchical responsibility is linked with superior at the time that the commission of illicit acts emerge from them and the commander is aware that the organizational structure is based on a system that has consolidated controls and communications.

The Trial Chamber III was not necessary to rely on the existence of the knowledge where the commander knew the identity of individual authors of the unlawful acts also determining in every single detail the crime that is committed by the forces under control, essential for the awareness of elements of crimes against humanity and war crimes that are the objects of the charges.

These are indices, requirements, where they have elaborated the dolus eventualis by drawing a line that demarcates the guilt. The pre-trial chamber deals with the informative factors that evaluate the existence of awareness on the part of the commander[33].

This is an evaluation that takes into consideration the factors relating to the profiles that represent the will of the malice, the

33ICC, Pre-Trial Chamber II, 15 June 2009, n. ICC-01/05-01/08-424, parr. 429-431.

certainty, the probability, the verification of the event, the processes of an excessive objectivity of the relative ascertainment.

The notion of knowledge is used within a context where command liability systematically includes psychological profiles that are related to criminal liability for crimes. Specifically, the statute of the ICC is based on art. 30 and proposes a restrictive psychological interpretation of the institute in question, of the related standards that authentically show the intent that extends to eventual intent and that excludes subjects from the recklessness that is used only in situations that do not lead to a reasonable conclusion (Badar, 2015; Lomsma, Roef, 2019; Ormerod, Perry, Murphy, 2023)[34] and in forms of guilt with

34Ormerod, Perry, Murphy affirmed that: "(...) intention and recklessness (in relation to the event [consequence]) is summarized in a sort of conceptual scheme, summarized as follows: a) consequence aimed to: intention; b) consequence foreseen as virtually certain: intention may be found; c) consequence foreseen as probable: typically (if risk unreasonable) recklessness (subjective); d) consequence foreseen as possible: typically (if risk unreasonable) recklessness (subjective); e) consequence not foreseen but ought to have been: negligence (objective recklessness); f) consequence not foreseen which even a reasonable person would not foresee: strict liability (…) situations under a) and b) are typically classified as intent (intention), those under c), except in cases of homicide, could be classified as intentional, but in the case of sufficiency of the indicated prerequisites it is easier for them to fall into the category of recklessness, which is less demanding in terms of evidentiary verification. The difference between hypotheses under d) and e) is found in the distinction between the notion of subjective recklessness (advertent recklessness), according to the Cunningham doctrine, and that of objective recklessness, according to the Caldwell doctrine, accepted for over twenty years by the House of Lords, but then rejected in 2003, on the basis of the decision R v. G [2003] UKHL50 [2004] 1 AC 1034, where Lord Bingham defines it, with regard to the offence of criminal damage in the following terms: A person acts recklessly (...) with respect to – i) a circumstance when he is aware of a risk that it exists or will exist; -a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk (…) foreseen that would make a conduct reckless therefore depends on the

foresight.

The negligent coefficients are relevant for command liability under a standard of the should have known that does not lead to an extension of the principle of guilt to a different coefficient where the intentional and negligent affect the measurement of the sentence that respects the principle of proportion.

It is understood that the notion of the knowledge is considered in an isolated way to a generic awareness that is able to cover the attitudes that are subjective to a moment of a representative nature thus conferring a requirement of a subjective nature.

The responsibility from command in the applicative field is extremely vague and able to cover in a general way the hypotheses of a fault where it is not foreseen and that attributes to the term of the contents that are set according to art. 30, par. 3 of the statute of the ICC (Ambos, 2022), a provision that excludes the terms of certainty and probability thus indicating the acceptance of a realization of the crime that leaves out any

reasonableness in order to assume that risk, not instead on the circumstance that it is an obvious risk and significant (an obvious and significant risk, which could be reinterpreted in a subjective sense, as an obvious and significant risk for the agent, or recognisable on the basis of his abilities). The subjective profile of this approach is based on the consideration of the risk foreseen by the agent or of what he was aware of, differently from the Caldwell recklessness based on the objectifying parameter of the obvious and serious risk, assessed on the basis of the yardstick of a reasonable person, without the possibility of any individualization of the same judgment in compliance with the principle of guilt. The objectifying aspect then in relation to the Cunningham doctrine lies in the assessment of the reasonableness of taking charge of the risk, which depends on the social value of the activity involved relative to the probability and severity of the damage that could be caused (…) evaluating the justifiability of the assumption of risk, which must be measured against that of a reasonable person, according to the ordinary standard of duty of care (…)".

hypothesis of the representation of the event within terms of probability, a possibility that respects the inertia of meanings that are of an equivocal nature.

The notion of the should have known for the Pre-Trial Chamber means that the psychological character requires only a negligent behavior for the commander in failing to make aware of illegal conduct for subordinates as a negligent breach of the duty he has to keep informed and able to prevent the related illegal conduct.

Thus the standard requires as a positive obligation for the commander to take the related measures that are necessary for the knowledge of the conduct of the troops and the availability of information at the time that the commission of crimes leave with evident way the relative difference between the military commanders and the superiors where the psychological coefficient is justified according to the conscius disregard of information that clearly indicated.

This is an important difference since the parameter of the had reason to know (Fellmeth, Crawford, 2022) is provided for by the statutes of almost all international criminal tribunals (Knoops, 2014; Robinson, 2017; Kemp, 2017; Yokohama, 2018; Konatè, 2018; Einarsen, 2018; Ventura, 2018)[35], without

35Art 6 Abs. 1 Statute of the Special Court for Sierra Leone, SCSL-Agreement v. 16.1.2002 (SCSL-Statut); Art. 29 Abs. 1 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Dem-ocratic Kampuchea, ECCC-Agreement v. 6.6.2003 (ECCC-Statute). ICC, Prosecutor v. Katanaga, ICC-01/04-01/07-3436, 7 March 2014, par. 1176.

however a further investigation for the aspects but as a possibility that uses the indexes that are elaborated by the jurisprudence of the same tribunals that ascertain as a parameter the evaluation of the should have known standard, relevant for the indications and the verification of the actual knowledge.

The various orientations that are outlined by the jurisprudence of the ad hoc tribunals and the standard of had reason to know have considered with a logical and prevailing way the basis of the interpretation of the had information from which to conclude as a duty that deduces the current facts that are known to the commander to the information that is available to the negligence that ignores with superficial assessability and analogous way the guilt that is foreseen by the statute of the ICC.

This is an interpretative position where the commander is considered to have known the relevant circumstances. The possession of general information that provides the news about crimes by subordinates is a possibility to control the unlawful acts. And the information is available to justify in an auxiliary way the investigations by the punishment of the committed crimes, the group of subordinates and the indication of a future risk[36].

The psychological coefficient of knowledge was not necessary for the same judging body to continue a control relating to the

36ICC, Pre-Trial Chamber II, 15 June 2009, n. ICC-01/05-01/08-424, parr. 432-434.

should have known but passes directly to the question that has to do with the possible omission of the commander to adopt the necessary measures that fall within his powers. This is an assessment where the case history according to the pre-trial chamber and the trial chamber have taken into consideration the circumstances in a concrete way.

The emerging jurisprudence of the international criminal courts considers the measures that are appropriate for the incumbent obligation that has to do with the commander, superior with reasonable and enforceable manner to the powers that are actually conferred to the same.

The de facto legal powers of the commander and the possibility of exercising the actual capacity of the commander to intervene with precise manner to the situation of the crimes that are committed by the subordinates are circumstances that exist at that time.

The pre-trial chamber has reported the forces formed according to international humanitarian law, the relationships that respect international law and how military activities are carried out, the directives that are given to the orders of any practices that are connected with international law as well as the measures that are regulated to the commission of atrocities by the forces where the command is located by the same commander. Thus, crimes that comply with the relevant measures of orders are prevented.

The troops are linked with the crimes that are committed and for those that will be committed in the near future also adopting measures to prevent, avoid the risks that are perpetrated in the commissions of inquiry in territories where the crimes are committed and the United Nations have publicly informed the conducts related to disobedience (misbehaviours) without other references to the serious crimes that are committed to a specific form of punishment.

In the Bemba Gombo case the crimes committed were perpetrated, reduced to risk by subordinates thus recognizing the failure to adopt reasonable measures by the commander for the commission of crimes.

In the Appeal chamber the logic was based on the assumption that the military commander was responsible for having adopted necessary measures and that he did not have the power to prepare the report of the crimes with a conscious manner and using the relative diligence to the command, to the powers with material manner of fact and law connected to each other.

The appeals chamber adopted the conceivable measure that has to do with proportionality, feasibility that requires reasonable measures. The trial chamber demonstrates that the existence of a causal link between the failure to prepare and the necessary measures were reasonable for the legal powers, the commission of specific crimes where the commander was convicted.

The responsibility of command did not correspond to an objective responsibility. The commander is authorized to operate the evaluation of costs, benefits that concerns the necessity, the reasonableness of measures adopted to prevent the repression of crimes for subordinates within the achievement of an objective, where military needs are related to the ongoing operations they carry out, identify the measures that are harmful and that respect the needs that ensure in a preventive manner the crimes of subordinates.

Within this context, the ECtHR has recognized the relevant relationship of breach of obligations that were positive for the protection of behaviors of state authorities that focus on the unlawful use of force thus avoiding to operate other judgments on the matter.

The relevant circumstances for the core crimes committed by the subordinates and the measures of the commander could abstractly take into account the logical method of following the assessment that is required to demonstrate that the commander did not adopt the relevant measures that he had at his disposal and the relevant diligence of analogous situations that they have arranged without unreasonably invading the evidence of the accused.

We have seen the same logic in the Appeal chamber. In it, the weight of the difficulties was based on the conduct of

investigations, in the powers that have regulated the facts that occurred in other countries that have had as a prerequisite the collaboration with the competent territorial authorities and with the modus of discovering the crimes committed as a reasoning that considers the evaluation, the need for the reasonableness of measures adopted by the commander that are completely irrelevant in the efforts that prevent the risks for the commission of crimes by subordinates who do not conduct other more restrictive approaches and in an unreasonable manner[37].

Concluding remarks

From the previous paragraphs we have noticed and understood that the theoretical-conceptual models have led to a contribution that has reasonably arranged the interpretative lines both from the ECtHR and from the international criminal tribunals, as a modus of concentration of greater criminal protection in the matter of command responsibility, where the interpretative indications are useful to uniformly solicit other more synthetic models of concepts of a criminal nature, transversal as they are

37ICC, The Appeals Chamber - Situation in the Central African Republic in the Case of The Prosecutor v. Jean-Pierre Bemba Gombo, 8 June 2018, N. ICC-01/05-01/08-3636, parr. 166ss, is affirmed that: "(...) had adequately taken into account the fact that Bemba Gombo had conferred disciplinary powers over their subordinates on the officers stationed in the territories where the crimes had been committed and that the number of crimes ascertained was not so high as to make the measures suggested proportionate, some of which (for example, that of the deployment of troops elsewhere to reduce contacts with the civilian population) had not been contested in the decision to confirm the charges and had therefore not adequately guaranteed the accused's right of defence (...)".

also used in the tradition of the ECtHR.

These are retrospective reasonings that verify general models that build with an applied way outcomes of reasoning that lead in terms of theoretical and systematic coherence a greater respect for the rights and guarantees of individuals who are involved.

The efforts to exercise a style of a theoretical-conceptual construction in criminal matters has increasingly circulated by meanings where they have a minimum final result of a univocal code for the respect of legal concepts as a sign of a very different significant scope. Limiting considerations and a legal language in communis for the interpretative risks that arise is a difficult reality for legal traditions.

The coordination of an essential nucleus that attributes to the legal concepts used by jurisprudence is applied by international jurisdictions and is the result of a conciliatory elaboration of various legal traditions in the criminal sector. They have to do with a jurisprudential coherence of a capacity that penetrates domestic criminal systems.

The execution of sentences have the obligation of compliant interpretation for national judges. It is a coordination that contributes to the interpretation of legal concepts in a perspective where respect for human rights and general principles in criminal matters affirms a scope of criminal

jurisdiction at an international level. The jurisprudence from the ECtHR has continuously given air of new horizons to hybrid concepts that are endowed with an autonomy that respects the original ones elaborated within specific legal traditions.

The determination of the causal link inspires the causal conditional paradigm, that clearly detaches itself from the precise position, that is found in the inconsistent antinomies. The main attention of the ECtHR was to verify the existence of paradigms that establish the causal link to different theoretical models of reference as a fixed point of conditions of models that have assumed the risk link that has abandoned the outlined model.

The psychological coefficients where the jurisprudence has made use of the intention, knowledge, negligence, recklessness in an univocal way make way for a reference, where the same ICC has regarded the concepts of intention and knowledge with particular efforts that autonomously identify events based on hybrid interpretations, on concepts such as the recklessness and negligence that take into consideration the legal traditions of the countries, that are part of the ECHR convention and are able to operate the concept of the recklessness that brings out the intentional coefficients that identify the different degrees of guilt.

These are hermeneutic difficulties that lead to the abandonment

of the initial project of the definition through the statute of the ICC. This is a valid interpretative tool for the concepts that are used and adopted also within the European Union through art. 83 TFEU that respected the harmonization in the sector by the European legislator of the relative concepts that have positive repercussions on domestic criminal systems when the sentences of the ECtHR must be executed and the conventional interpretation is oriented towards domestic criminal law by the judges themselves.

This is an important attempt towards a logic that has as its objective the precaution from a technological, health risk, etc., within the jurisprudence of the ECtHR. It has brought the paradigms of reconstruction back to the positive obligations of criminal protection also outlining the criminal law of event and thus penetrating the logic of precaution, to a model of management of a collective private, public nature of the risk as a result of public authorities and as a positive obligation of prevention of punitive mechanisms within interventions of a legislative, social, economic policy capable of giving more legal and less political impulses to the organization that damages, endangers the fundamental legal assets.

The obligations of corporate due diligence, identification, prevention of risks and management for the violation of human rights are control obligations that build positive obligations that

involve the responsibility of state authorities for serious, negligent behaviors of entities, collectives, where they have characterized public participation as a consideration of each individual who shows useful interest for the community, for the human rights of all.

Positive obligations have an immediate interest where it requires the necessary procedures to bring more democracy to decision-making processes. In this way, the risk management assessment is an intervention of state authorities where risks through the jurisprudence of international criminal courts leave a wide margin of appreciation to states, within balanced terms of different game interests that put in place tools for liability, in terms of compliance of the related appeals of a sanctioning apparatus, which has a purely punitive character within a criminal sphere, where the guarantees provided if not all from the criminal point of view are now rigorous and restrictive.

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